

APR 07 2003

STATE OF WISCONSIN

CIRCUIT COURT

LINCOLN COUNTY

Rodney Greil
Greil American Family Agency
Petitioner

vs.

Wisconsin Department of Commerce, an
agency of the State of Wisconsin
Respondent

Decision

Case No. 02-CV-207

The petitioner, Rodney Greil, is the owner of a premises located at 303 W. Wisconsin Avenue, Tomahawk Wisconsin. He filed a claim with the Wisconsin Department of Commerce for reimbursement of site clean-up expenses at this premises. He was reimbursed for all but \$879 which were expenses associated with the excavation and replacement of the sidewalk adjacent to his property.

He appealed this denial and a hearing was held before an administrative law judge on August 5, 2002. On September 9, the administrative law judge issued a decision upholding the Department's denial of reimbursement. The petitioner has appealed that decision.

The Court, pursuant to Wisconsin Statute sec. 227.57(4), hereby remands this case to the agency for a re-hearing finding that the fairness of the proceedings has been impaired by failure to follow the prescribed procedure.

It is undisputed that on August 1, 2002 the administrative law judge held an ex parte conference with one Eric Scott who was then employed by the Department of Commerce as a site reviewer in the Petroleum Environmental Clean-up Act program. This meeting was held at the request of the administrative law judge. It lasted approximately 2-2½ hours. According to Mr. Scott's affidavit, the questions asked by the administrative law judge included application of

the rule provision covering exemption from commodity bidding if a cost is under \$1,000. This was the issue before the judge in hearing Mr. Greil's claim.

Wisconsin Statute sec. 227.50 covers ex parte communications in contested administrative case. Subsection (2) provides that if a hearing examiner receives an ex parte communication in violation of subsection (1) of the statute the examiner shall place, on the record of the pending matter, a memorandum stating the substance of the communication, if oral, and shall also advise all parties that the material has been placed on the record. The statute further provides that any party desiring to rebut the communication shall be allowed to do so if the party requests the opportunity for rebuttal within 10 days after notice of the communication.

In this case, the examiner did not follow the statute. After the hearing, and before a decision was rendered, counsel for the Department of Commerce found out about and raised the issue regarding the ex parte communication. In her decision, the administrative law judge noted this but concluded that her "ability to render an objective, impartial and fair decision has not been compromised specifically because the present matter was not part of any discussion which occurred between the administrative law judge and the PECFA hydrogeologist."

This was not the point. The Court finds that, by statute, the parties had the right to know about this communication and to act accordingly before any hearing was held. The Court finds that failure to do this has compromised the integrity of the decision making process in this instance even though, ultimately, the decision may be upheld.

The Court does not find, from the record, that the evidence is so overwhelming that it must conclude that the decision would be upheld. It is not clear that this item, which was not included in the contractor's bid, is one that should not be an exception to the reimbursement rule.

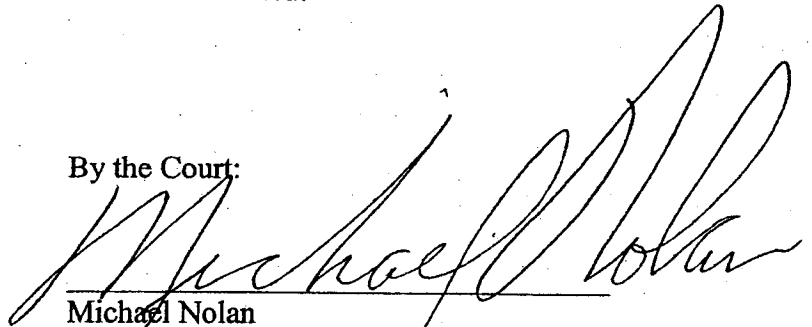
It appears that the need to dig into the sidewalk was discovered after the bids were let and the work begun. It is not clear that this was something that could have and should have been anticipated prior to the bidding. This does not involve a series of items under \$1,000 being supplied by the same contractor.

It appears to the Court that, as a matter of law, it should have been clear to the administrative law judge that the petitioner did not own or control the public sidewalk in front of his place of business. For instance, except in limited circumstances, public sidewalks are not considered a place of employment under the Wisconsin Safe Place statute. See Miller vs. Welworth Theaters 272 Wis. 355 and Schwenn vs. Lorraine Hotel Co. 14 Wis. 2d 601.

Case remanded for a new hearing pursuant to statute as above noted.

Dated: April 3, 2003

By the Court:



Michael Nolan
Circuit Court Judge, Branch I